

Supporting submission

**in relation to the Access Undertaking lodged
pursuant to Part 3.3, Division 4B, Subdivision B of the
Radiocommunications Act 1992**

29 October 2018

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1. Introduction

This supporting submission accompanies the access undertakings lodged by the eligible joint venture companies for Canberra, Darwin and Hobart (each, a **JVC**) pursuant to Part 3.3, Division 4B, Subdivision B of the *Radiocommunications Act 1992* (Cth) (**Radiocommunications Act**).

Each JVC has provided the Australian Competition and Consumer Commission (**ACCC**) with an identical access undertaking that has been prepared taking into account:

- the terms of Part 3.3, Division 4B of the Radiocommunications Act;
- the Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2018 (**Decision-Making Criteria**);¹
- the Explanatory Statement accompanying the Decision-Making Criteria (**Explanatory Statement**); and
- the Digital Radio Multiplex Transmitter Licences Procedural Rules 2018 (**Procedural Rules**).

This supporting submission provides an overview of the architecture and design of the access undertaking and access agreement and the reasons why it should be accepted by the ACCC pursuant to section 118NF of the Radiocommunications Act.

The JVCs have proposed 1 March 2019 as the digital radio start up day for Canberra, Darwin and Hobart markets in their DRMT licence applications. The JVCs are seeking approval of the proposed access undertaking on or shortly after this date.

2. Executive Summary

2.1 Key messages

- The JVCs have developed a comprehensive access undertaking and access agreement for the supply of multiplex capacity to incumbent commercial broadcasters and digital community broadcasters in the relevant BSA radio area.
- The proposed access undertaking adopts the regulatory architecture that the ACCC has already accepted for the Sydney, Melbourne, Brisbane, Adelaide and Perth markets (the **Metropolitan Markets**) and which has operated effectively in those markets for almost a decade.
- The JVCs have not proposed to substantively alter the terms of access previously approved by the ACCC for the Metropolitan Markets. However, the JVCs have made a range of amendments to further improve the terms of access. This includes:

¹ As made under *Radiocommunications Act 1992* (Cth) section 118NJ.

- changes that take account of the experience gained by the JVCs operating in the Metropolitan Markets;
 - simplification of the access undertaking to remove redundant provisions and to place greater reliance on the statutory provisions in Part 3.3, Division 4B of the Radiocommunications Act; and
 - better non-price terms for access seekers in relation to certain matters.
- The JVCs have developed the access undertaking and access agreement having regard to high-level preliminary discussions with the commercial and community radio broadcasting sector, as well as informal pre-lodgement feedback from ACCC staff.
 - The proposed access undertaking will facilitate access to multiplex capacity on equal terms by all access seekers. It will also ensure that all investment in DAB+ infrastructure is economically efficient by only permitting the JVCs to recover their efficient costs plus a reasonable commercial rate of return.
 - The proposed terms of access will encourage an equal playing field in downstream markets and promote greater competition in those markets and provide greater choice and quality.
 - The JVCs consider that the access undertaking and access agreement are:
 - consistent with the Decision-Making Criteria and the Procedural Rules; and
 - capable of acceptance by the ACCC without amendment.

2.2 JVCs have strong incentives to operate efficiently

- Each JVC has strong incentives to incur costs efficiently and to avoid the unnecessary gold-plating of network investments.
- These incentives are a function of the following:
 - the wholesale structure of each JVC, which creates separation between the JVC and each shareholder access seeker. This separation will avoid many of the issues that would typically arise in a more traditional vertically-integrated supply chain; and
 - the fact that JVC shareholders are also access seekers, creating strong incentives on each JVC shareholder to avoid passing through inefficient costs into their own downstream radio broadcasting businesses.
- These incentives are complemented by a range of elements within the proposed access undertaking and access agreement that operate to ensure economically efficient outcomes, and which will facilitate competition in downstream markets. These include:

- the use of a standardised technical design and operational processes to deliver the multiplex transmission service, ensuring that supply occurs on non-discriminatory terms and that each access seeker can obtain an identical service from an operational and technical perspective;
- a standardised approach to pricing which applies to both incumbent commercial broadcasters and digital community broadcasters, ensuring that all access seekers pay the same level of access fees and are able to access the multiplex on equal financial terms; and
- a requirement that each JVC can only recover its efficiently-incurred costs plus a reasonable rate of return on its capital, ensuring that pricing outcomes are economically efficient.²

2.3 Access undertaking complies with ACCC Decision-Making Criteria

- The JVCs submit that the undertaking is consistent with the Decision-Making Criteria. In particular, the proposed access undertaking:
 - complies with Division 4B of Part 3.3 of the Radiocommunications Act;
 - promotes and facilitates competition in related markets, notably in the downstream markets for radio broadcasting which will have the benefit of higher quality services (relative to analogue), greater choice for end-users and advertisers through the potential for multi-channelling, more niche offerings and other enhancements (e.g. electronic program guides);
 - includes an access pricing methodology that is fair and reasonable, including terms that ensure only efficient costs and an ACCC-endorsed rate of return are recoverable, and through associated processes that seek to provide all access seekers with a reasonable degree of visibility of the level of access fees and the ability to make appropriate submissions;
 - includes an obligation on the licensee to not hinder access to services; and
 - includes terms and conditions of access that provide for a reasonable dispute resolution mechanism, including options for mediation and expert determination.
- The JVCs would be pleased to discuss the access undertaking and this supporting submission in greater detail with the ACCC.

² The JVCs have proposed to adjust annually based on an ACCC-endorsed rate of return (derived from ACCC regulatory determinations in other relevant sectors).

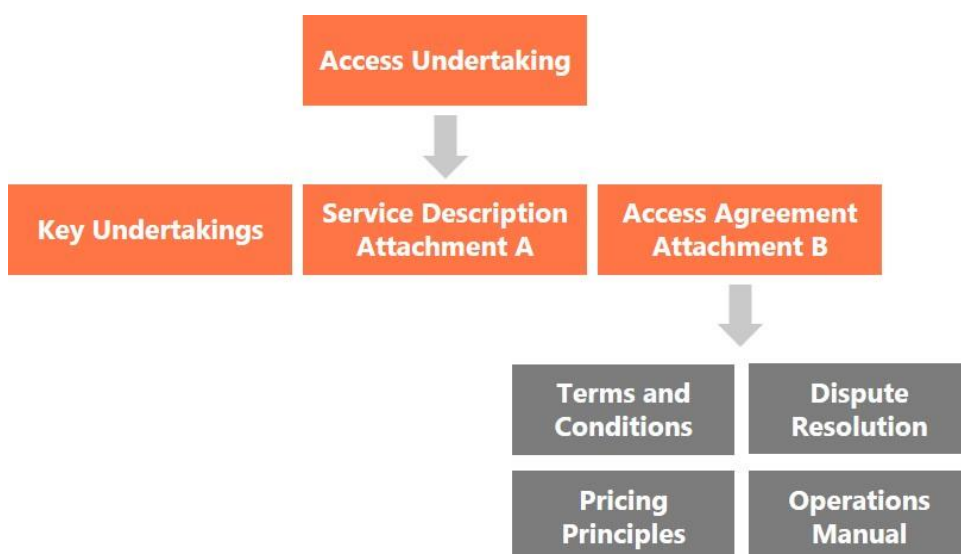
3. Key features of the access undertaking

3.1 Basic structure of access undertaking and access agreement

The access undertaking sets out the terms and conditions on which the JVCs (each, a **Multiplex Licensee**) will provide multiplex capacity to access seekers.

The supply of multiplex capacity enables incumbent commercial broadcasters and digital community broadcasters to obtain standard access entitlements and any available excess-capacity access entitlements to which they may become entitled.

The access undertaking is structured as follows:



As shown above, the access undertaking seeks to give effect to the rights and obligations of the Multiplex Licensee and access seekers through a comprehensive access agreement, which provides the basis for the allocation of standard access entitlements and excess-capacity access entitlements.

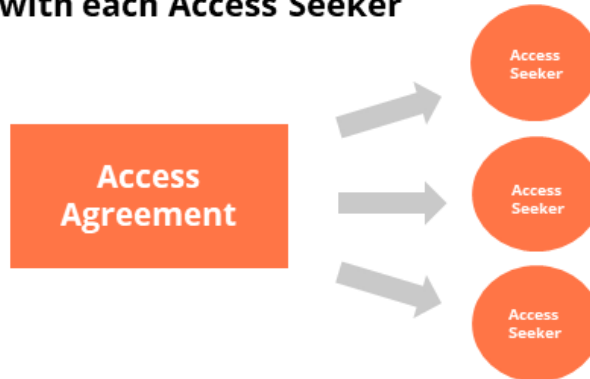
The JVCs have proposed that the access agreement will form part of the access undertaking. However, the access agreement will also separately operate as a contractual document. Consequently, it will allow:

- each Multiplex Licensee to give effect to its regulatory obligations under the access undertaking in respect of each access seeker; and
- the Multiplex Licensee to enter into an access agreement bilaterally with each access seeker on identical terms to that contained in the access undertaking.

Access Undertaking submitted to ACCC



JVCs enter into Access Agreement with each Access Seeker



The proposed term of the access agreement is linked to term of the access undertaking, which in turn is linked to the term of the relevant Digital Radio Multiplex Transmitter Licence (i.e. 15 years).³ This approach aligns with the approach used in metropolitan areas since the ACCC approved the varied access undertaking in December 2013.

3.2 Design principles for the access undertaking

The JVCs have developed the proposed access undertaking and access agreement by using the undertaking accepted by the ACCC on 22 April 2009 and the variation accepted by the ACCC on 19 December 2013 in respect of the Sydney, Melbourne, Brisbane, Adelaide and Perth markets as the baseline (**Metro Access Undertakings**).

As the Metro Access Undertaking have already been accepted by the ACCC (based on the same terms as the Decision-Making Criteria) and these arrangements have operated effectively in the Metropolitan Markets for almost a decade, the JVCs have proposed a regulatory architecture that does not substantively deviate from the approach previously accepted by the ACCC for the Metropolitan Markets.

However, the JVCs have nonetheless made several refinements in developing the proposed undertaking. These refinements seek to take account of the experience that has been gained in the last decade since the Metro Access Undertakings were initially accepted, including the industry learnings in relation to how various aspects of the access undertaking have operated in practice.

This has resulted in a simplification to the structure of the access agreement proposed for Canberra, Darwin and Hobart.

Some of the most relevant changes include:

³ Access undertaking, clause 2.2 of the main body.

- the removal of unnecessary duplication between the terms of the access agreement and the equivalent statutory provisions contained within the Radiocommunications Act, allowing for more express reliance on the relevant statutory provisions; and
- additional clarity for the benefit of access seekers.

A summary of the key substantive changes that exist between the proposed undertaking and the Metro Access Undertaking are summarised below:

Change	Summary of change	Rationale
Removal of conditions precedent (clause 4 and Attachment A)	The conditions precedent for the access agreement have been removed.	(1) Requested by CBAA in high-level preliminary discussions. (2) Financial risks addressed through pre-payments agreed with CBAA (see below).
Removal of upfront financial security requirement	Removal of right for Multiplex Licensee to require a financial security upfront.	(1) Requested by CBAA in high-level preliminary discussions. (2) Financial risk addressed through pre-payment of access fees for Canberra, Darwin and Hobart markets by CBAA (on behalf of digital community broadcasters).
Excess-capacity access entitlements	Provisions relating to allocation of excess-capacity access entitlements, including auction related provisions, have been removed.	Not necessary, as largely duplicative of provisions and processes within Radiocommunications Act.
Capacity cap	Provisions limit total holdings to 2/9 capacity per broadcasting licence, but now allow for a higher proportion if Radiocommunications Act is amended.	Provides flexibility if there is change to approach under the Radiocommunications Act.
Representations and warranties	Representation and warranty in relation to broadcasting content removed.	(1) Not directly relevant to provision of multiplex transmission service. (2) Minimal risk of such claims (as demonstrated in metropolitan markets context).
Modification of the pricing principles	The pricing principles have been updated to require the Multiplex Licensee to: <ul style="list-style-type: none"> ▪ undertake an annual review of access charges; and ▪ update the WACC annually using an ACCC-endorsed rate of return. 	(1) Ensures that pricing, including WACC, is updated annually. (2) Ensures commercial rate of return set by Multiplex Licensee aligns with ACCC endorsed WACC.
Overpayments by access seeker	Period for access seeker to recover an overpayment extended to 180 days.	Reciprocal and aligned with 180-day period for Multiplex Licensee to recover omitted or miscalculated charges.
Suspension and termination rights for insolvency	Termination rights now explicitly subject to applicable laws.	Takes account of recent changes to the Corporations Act in respect of ipso facto termination rights.

Suspension or powering down	Multiplex Licensee must select the option that is the most proportionate in the circumstances.	Adds proportionality and fairness to the way that the Multiplex Licensee may exercise its contractual rights.
Access seeker indemnity for third party claims	Removed indemnity given by access seeker in respect of third-party claims against Multiplex Licensee.	Minimal risk of such claims (as demonstrated by experience from the Metropolitan Markets).
Confidentiality obligations	Optimisation of confidentiality provisions, including new right to disclose to ACCC and ACMA where necessary to comply with laws or lawful directions.	Reflects experience gained from the Metropolitan Markets.

As the above table makes clear, a number of the proposed changes have been developed based on experience from the Metropolitan Markets and further in preliminary discussions with access seekers from the Canberra, Hobart and Darwin markets. The JVCs have also had regard to feedback from ACCC staff (provided on an informal basis) in developing the access undertaking.

Consequently, the proposed access undertaking optimises the arrangements that had previously been accepted by the ACCC for the Metro Access Undertakings.

3.3 Service Description – Multiplex Transmission Service

The access regime provides for access to “multiplex capacity”, which is defined in the Radiocommunications Act as “*so much of the gross transmission capacity of the multiplex transmitter as is available for the transmission of content services.*”⁴

This concept has been developed into a comprehensive technical service description in Attachment A to the access undertaking. The Multiplex Transmission Service comprises three bundled components:

- a multiplexing service, comprising the multiplexing of digital channels from multiple access seekers into a single transport stream;
- a modulation service, comprising the modulation of the single transport stream using orthogonal frequency division multiplex (**OFDM**) in preparation for radio frequency transmission; and
- an RF service, comprising the radio frequency transmission of the OFDM modulated transport stream.

The proposed service description is largely identical to that included within the varied access undertaking that the ACCC previously accepted for the Metropolitan Markets in December 2013.

It supports the provision of the Multiplex Transmission Service from a main transmitter site (as per the current intent of each JVC). However, it also provides sufficient flexibility for each JVC to augment its main transmission signal using on-channel repeaters at a future

⁴ *Radiocommunications Act 1992* (Cth) section 118NB.

date without the need for the JVC to request a variation to its access undertaking (as was previously required to support the rollout of OCRs in the Metropolitan Markets in 2013).

This approach ensures flexibility in how each JVC can deliver the Multiplex Transmission Service in the future to address coverage ‘blackspots’ which are considered by the JVC to require additional investment. Any such additional investment would occur in accordance with the pricing principles in the access undertaking, ensuring that any such costs are economically efficient.

3.4 Allocation of capacity

The access agreement sets out the terms and conditions on which the Multiplex Licensee will provide multiplex capacity to enable:

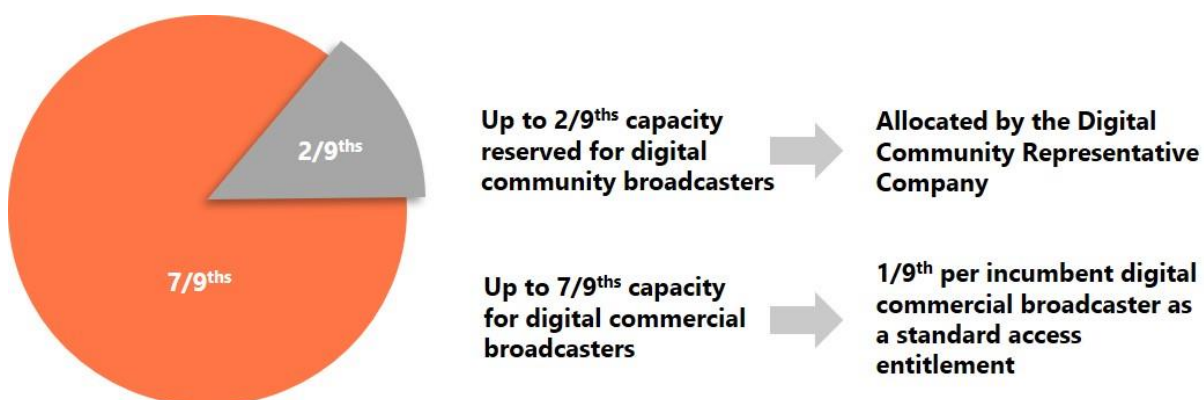
- incumbent commercial broadcasters and digital community broadcasters to each obtain a standard access entitlement to which it is entitled; and
- incumbent commercial broadcasters and digital community broadcasters to each obtain an excess-capacity access entitlement to which it may be entitled.

The amount that each access seeker is entitled to obtain is determined by the Radiocommunications Act. In the case of digital community broadcasters, the Radiocommunications Act also provides:

- for the Digital Community Representative Company to determine which individual digital community broadcasters will receive access to multiplex capacity; and
- for the total amount of multiplex capacity allocated to digital community broadcasters to be capped at $\frac{2}{9}$ of the overall capacity on a digital radio multiplex.

The access agreement provides for the allocation of multiplex capacity to incumbent commercial broadcasters and digital community broadcasters in accordance with the overall allocation requirements in the Radiocommunications Act.

This includes the following allocations in the case of standard access entitlements to be made available to access seekers in the first instance:



3.5 Supply of Multiplex Transmission Service

The access agreement operationalises the Multiplex Licensee’s commitments in relation to standard access obligations and excess-capacity access obligations (and the right of access

seekers to obtain standard access entitlements and excess-capacity access entitlements) through the supply of the Multiplex Transmission Service.

The supply of the Multiplex Transmission Service under the access agreement is subject to the non-discrimination obligations in section 118NP of the Radiocommunications Act in relation to technical and operational quality, as well as an obligation not to hinder access to the Multiplex Transmission Service as required under the Decision-Making Criteria.

3.6 Pricing principles

Schedule 2 of the access agreement sets out the pricing principles for the Multiplex Transmission Service.

The proposed pricing principles have been modelled on the approach used in the Metropolitan Markets and is based on the same regulatory design.

The pricing principles provide for the Multiplex Licensee to:

- recover no more than its efficient costs, using market-based procurement mechanisms in relevant circumstances to ensure value for money;
- obtain a reasonable commercial return on its investment, determined by reference to an ACCC-endorsed WACC from another regulated sector;
- use a simple straight-line depreciation method to ensure a smooth and predictable approach to the depreciation of assets over their useful life;
- review its access charges (including the WACC) annually; and
- consult with access seekers in relation to any adjustment to the level of access charges, including obligations to have regard to any feedback and the option for dispute resolution.

A more detailed explanation of the methodology for calculating the charges payable is set out in section 4 below.

The JVCs have not provided indicative pricing at this point in the regulatory process but would be pleased to do so if the ACCC considered this would assist the assessment process.

3.7 Liability and indemnity regime

The access agreement provides for a fair and equitable liability and indemnity regime, which primarily operates on a reciprocal basis and is closely modelled on the terms that have been used in the Metropolitan Markets.

The liability and indemnity regime included within the access agreement includes the following elements:

- neither party is liable for consequential loss (except for wilful or deliberate breach, act or omission).⁵

⁵ Access agreement, clause 15.2 of the main body.

- each party's liability is capped at \$100,000 for any one event in any 12-month period and \$250,000 for all events in any 12-month period, subject to some reasonable exceptions.⁶
- an obligation on each party to indemnify the other party in respect of death, personal injury, or property damage arising from breaches of the access agreement or any negligent, wilful, reckless or unlawful act or omission of the indemnifying party or its personnel.⁷

4. Access undertaking is consistent with the Decision-Making Criteria

4.1 Background

The access undertaking lodged by JVCs is consistent with the Decision-Making Criteria and should be approved by the ACCC in accordance with section 118NF of the Radiocommunications Act.

The Decision-Making Criteria provides as follows:⁸

(1) In deciding whether to accept an access undertaking, the ACCC must have regard to the following matters:

(a) whether the access undertaking complies with Division 4B of Part 3.3 of the Act;

(b) whether the access undertaking unduly restricts competition in related markets;

(c) whether the terms and conditions of access specified in the access undertaking are reasonable;

(d) whether the terms and conditions of access specified in the access undertaking include access prices or pricing methodologies which are fair and reasonable;

(e) whether the access undertaking includes an obligation on the licensee to not hinder access to services;

(f) whether the terms and conditions of access specified in the access undertaking provide for a reasonable dispute resolution mechanism.

These are not exhaustive factors,⁹ allowing the ACCC to have regard to other relevant factors in its decision-making.

⁶ Access agreement, clause 15.4(a) of the main body.

⁷ Access agreement, clause 15.7 of the main body.

⁸ *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2018*, section 6(1).

⁹ *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2018*, section 6(2).

The Explanatory Statement provides greater guidance on how the ACCC intends to apply each aspect of the Decision-Making Criteria.¹⁰ The access undertaking has been developed with specific regard to the Decision-Making Criteria and the Explanatory Statement, along with relevant jurisprudence in connection with Part IIIA and Part XIC of the *Competition and Consumer Act 2010 (Cth) (CCA)*.

The JVCs submit that the access undertaking satisfies the requirements of the Decision-Making Criteria. Consequently, the proposed access undertaking should be accepted by the ACCC without amendment.

4.2 The access undertaking complies with Division 4B of Part 3.3 of the Radiocommunications Act

Division 4B of Part 3.3 of the Radiocommunications Act sets out the access regime for digital radio multiplex transmitter licences.

The terms and conditions of the access undertaking are modelled on, and comply with, the provisions contained in Division 4B of Part 3.3 of the Radiocommunications Act. In particular, the access undertaking and access agreement provide for the Multiplex Licensee:

- to comply with access obligations applicable with the licence on such terms and conditions as are ascertained in accordance with an access undertaking in force in relation to the licence;¹¹ and
- to not discriminate between content service providers who have access to multiplex capacity under the licence in relation to:¹²
 - the technical and operational quality of services; and
 - the technical and operational quality and timing of fault detection, handling and rectification processes.

The access undertaking includes a provision that expressly requires the Multiplex Licensee to undertake to be bound by the obligations set out in that Division.¹³

The non-discrimination obligation in section 118NP of the Radiocommunications Act is expressly incorporated in clause 3.1(b) of the access undertaking, and clause 7.3 of the access agreement.

The access agreement also provides further assurances that the Multiplex Licensee will:

- provide each incumbent commercial broadcaster and digital community broadcaster with access to the fraction of multiplex capacity to which it is entitled as a standard access entitlement;¹⁴ and

¹⁰ ACCC, Explanatory Statement – issued by the ACCC relating to the *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2018*.

¹¹ *Radiocommunications Act 1992 (Cth)* section 118NO.

¹² *Radiocommunications Act 1992 (Cth)* section 118NP.

¹³ Access undertaking, clause 3.1(a) of the main body.

¹⁴ Access agreement, clause 4.2 of the main body.

- reserve two-ninths of multiplex capacity for use digital community broadcasters who are nominated by the digital community broadcasting representative company.¹⁵

4.3 Whether the access undertaking unduly restricts competition in related markets

The Explanatory Statement provides further detail for the phrase “*unduly restricts competition*”:¹⁶

“An access undertaking should not frustrate or unreasonably restrict the ability of an access seeker (a person with either a standard access entitlement and/or an excess-capacity access entitlement) to provide services, including in competition with any services provided by other parties. Similarly, an access undertaking should not favour particular access seekers.”

The JVCs submit that the access undertaking will not unduly restrict competition in downstream markets. In fact, the more likely outcome is increased levels of competition in downstream markets.

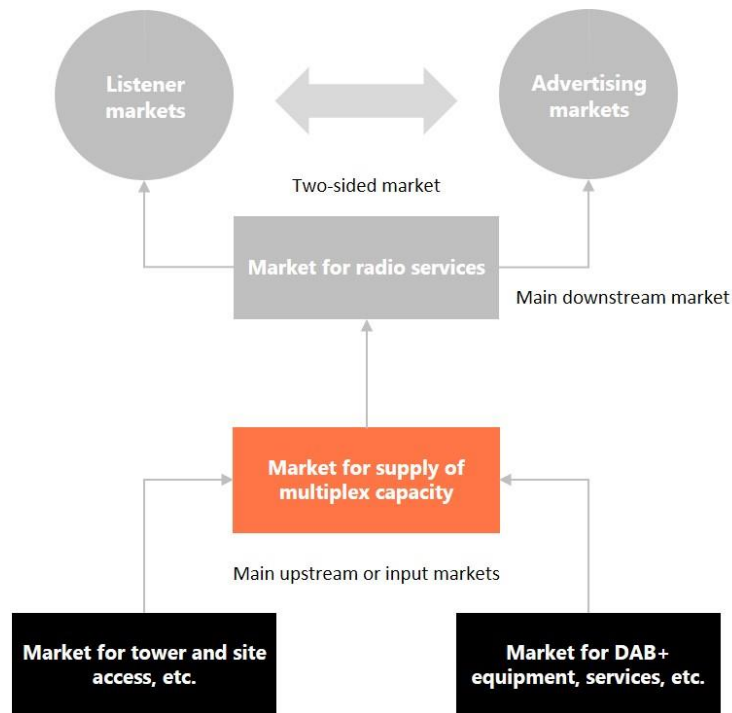
There are likely to be several related markets that are relevant to the ACCC’s analysis:

- the primary market for the supply of multiplex capacity by each JVC;
- the downstream market for the supply of radio services;
- associated downstream advertising and listenership markets; and
- upstream markets for access to towers and other infrastructure and services that support the supply of multiplex capacity by each JVC.

The functional level of these markets in the radio supply chain is depicted below:

¹⁵ Access agreement, clause 4.4(c) of the main body.

¹⁶ ACCC, Explanatory Statement – issued by the ACCC relating to the *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2018*, page 6.



As digital radio services will complement existing analogue services (which will continue to be broadcast with no switch-off date currently proposed) and digital radio services entail significant greater capacity for multi-channelling and more niche offerings, the JVCs submit that the access undertaking will most likely facilitate higher levels of competition in downstream markets.

This will include:

- greater choice for listeners who will have the ability to pick from a larger number of channels and offerings which are expected to be made available on DAB+ (as has been the case in the Metropolitan Markets); and
- greater choice for advertisers who will have the additional ability to advertise through a larger number of digital radio channels and to build digital radio services into their buying portfolio (as has also been the eventual outcome in the Metropolitan Markets).

The JVCs submit that the access undertaking will operate to facilitate the supply of digital radio broadcast services on a competitive basis in downstream markets. Each JVC will deliver multiplex capacity to incumbent commercial broadcasters and digital community broadcasters in the relevant BSA radio area:

- on a non-discriminatory basis, including as between incumbent commercial broadcasters and digital community broadcasters who will receive access on the same terms; and

- in a transparent way, with multiplex capacity being allocated in accordance with pre-existing statutory entitlements and based on pre-defined limits for certain categories of use (as set out in the Radiocommunications Act).

The outcome of the proposed access undertaking is that each access seeker will not be unduly restricted or otherwise prevented from participating in downstream markets on equal terms. In fact, our expectation is that the access undertaking will promote competition in downstream markets.

Similarly, the JVCs consider that the access undertaking will most likely have a neutral impact on upstream markets that serve as an input to the Multiplex Transmission Service.

The JVCs will be acquirers of infrastructure, equipment and services from several vendors and suppliers. The scale and nature of this supply is unlikely to have any material impact on these upstream markets and is expected to be neutral from a competition perspective.

4.4 Whether the terms and conditions of access specified in the access undertaking are reasonable

The JVCs submit that the terms and conditions of access specified in the access undertaking are reasonable.

The ACCC, when considering whether such terms are reasonable, will consider attributes such as “*certainty, fairness and balance, timeliness and the removal of any potential for delaying access*”.¹⁷

Some examples of what the ACCC will consider include:¹⁸

- the legitimate business interests of the licensee and its investment in facilities used to supply the service;
- the interests of persons who have rights to use the service;
- the standard of transmission facilities or services offered, including the compatibility or inter-operability of the equipment and facilities of the access providers (i.e. licensees) with those of potential access seekers;
- the public interest in having competition in markets and efficient investment in facilities and services;
- the operational and technical requirements necessary for the safe and reliable operation of the service; and
- the economically efficient operation of the network.

These concepts align with, or are modelled upon, the decision-making criteria that has been applied under Part IIIA and Part XIC of the CCA. The JVCs have set out brief responses to each of these factors below, having regard to the Explanatory Statement for the

¹⁷ ACCC, Explanatory Statement – issued by the ACCC relating to the *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2018*, page 6.

¹⁸ *Ibid*, page 7.

Decision-Making Criteria and its approach to interpreting these concepts in the context of Part IIIA and Part XIC of the CCA.

Legitimate business interests of the licensee and investment in facilities used to supply the service

The legitimate business interests of the Multiplex Licensee include the ability of the Multiplex Licensee:

- to recover the efficient costs of operating its business and supplying the Multiplex Transmission Service to access seekers; and
- to achieve a normal commercial rate of return (e.g. a rate of return that appropriately reflects the risks incurred by the Multiplex Licensee in undertaking its business).

The Australian Competition Tribunal has previously held that a “legitimate business interest” is a “reference to what is regarded and allowable and appropriate in commercial or business terms”, which would include “the interest of a carrier in recovering the costs of its infrastructure and its operating costs and obtaining a normal return on its capital.”¹⁹

Such concepts recognise that, in a regulated setting, although the public interest in productive and allocative efficiency may be served by regulating access to a service, the incumbent service provider is nevertheless permitted to derive economic benefit from investing in, and providing, that service.²⁰ From a regulatory pricing perspective, in particular, this requires consideration of a number of factors, such as whether the return on efficiently incurred investment generated by the proposed pricing (and underlying methodologies) is reasonable.²¹

The JVCs submit that the access undertaking promotes the legitimate business interests of the Multiplex Licensee and its investment in digital radio infrastructure.

In particular, the pricing principles:

- provide that the Multiplex Licensee can recover no more than its efficient costs for supplying the Multiplex Transmission Service;²²
- establish a range of factors to guide whether costs are being incurred efficiently by the Multiplex Licensee;

¹⁹ *Re Telstra Corporation Limited* [2006] ACompT 4, [89] (Goldberg J, R Davey and D Round).

²⁰ See generally comments, in the context of Part IIIA of the CCA, in *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2, [604] (Finkelstein J, G Latta and D Round). See also *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) 193 FCR 57, 102 [108].

²¹ *Telstra Corporation Limited v Australian Competition and Consumer Commission* (2009) 179 FCR 437, 476 [195] (Lindgren J). See also *Application by Telstra Corporation Limited* [2010] ACompT 1, [339] (Mansfield J, R Steinwall and RF Shogren).

²² Access agreement, clause 3.1 of Schedule 2.

- permit the Multiplex Licensee to earn a normal commercial rate of return that reflects the returns of other regulated firms, with a similar risk profile and at a similar phase of their business cycle;²³ and
- provide for the Multiplex Licensee to adopt an ACCC-endorsed WACC, with the Multiplex Licensee setting the WACC annually by reference to the latest regulatory determination that has been adopted by the ACCC in another regulated sector (e.g. telecoms, electricity or gas).

The proposed approach to setting the WACC, which differs from the approach adopted in the Metro Access Undertaking, ensures that the ACCC's decision making in other regulated sectors is taken into account when setting the rate of return, while also addressing the fact that the Radiocommunications Act does not permit the Multiplex Licensee to confer powers on the ACCC within the access undertaking itself to formally set or approve the WACC.

Interests of persons who have rights to use the service

The access undertaking provides content service providers with access to their standard access entitlements and/or excess-capacity access entitlements on a non-discriminatory basis in relation to price and non-price terms.

This permits content service providers to provide digital broadcasting services to their target segments and to compete in downstream markets.

The allocation of standard access entitlements and excess-capacity access entitlements (and the provision of the Multiplex Transmission Service) occurs:

- on equal terms in respect of price, with a transparent approach to the setting and review of access charges;
- on a non-discriminatory basis with respect to technical and operational quality; and
- on terms and conditions that are reasonable and fair to access seekers, including with respect to liability issues, suspension and termination, confidentiality and dispute resolution.

In doing so, the access undertaking will promote the interests of persons who have the right to use the services, including both incumbent commercial broadcasters and digital community broadcasters.

The standard of transmission facilities or services offered

Each JVC has designed the Multiplex Transmission Service to support reasonable levels of availability and quality, while avoiding over-investment and gold-plating.

There are several factors that influence the current approach, including:

²³ Access agreement, clause 3.4(c) of Schedule 2.

- the need to align the upfront costs of DAB+ infrastructure deployment with the revenue generation opportunities associated with DAB+ radio services which are expected to lag behind the deployment of such infrastructure by several years;
- the expected rate of adoption and take-up of DAB+ receivers in the Canberra, Darwin and Hobart BSA radio areas;
- the fact that the JVCs have already deployed DAB+ infrastructure in Canberra and Darwin, which is currently operated under a scientific licence. The JVCs for Canberra and Darwin are not currently planning a wholesale swap out of such infrastructure to support the move to the long-term licensing framework on or after 1 March 2019. Rather, the JVCs intend to continue to use existing infrastructure with targeted upgrades and updates. Such an approach is prudent and avoids unnecessary costs being incurred by the JVC, which would then need to be passed through in the form of higher access charges; and
- that the current design for DAB+ transmission in Canberra, Darwin and Hobart involves the use of a single main transmission site, rather than a fully redundant configuration, ensuring cost efficiency. The JVCs also do not currently plan to deploy on-channel repeaters but may do so in the future if service quality issues are identified.

From a service standard standpoint, the Multiplex Transmission Service will be supplied on an identical basis to each access seeker from a technical and operational perspective. The service is designed based on international standards for DAB+ services, as further described in the service description in the access undertaking. The access undertaking, however, also contains sufficient flexibility to allow access seekers to differentiate their services and to configure their streams to support multiple channels, avoiding a “lowest common denominator” approach to access and allowing for innovation in downstream markets.

Considering the above, the JVCs submit that the standard for the Multiplex Transmission Service is currently appropriate, having regard to the early phase of DAB+ radio services in the Canberra, Darwin and Hobart markets and the currently limited distribution of DAB+ receivers in this market.

The public interest in having competition in markets and efficient investment in facilities and services

The access undertaking promotes the public interest in having competition in downstream markets, while also ensuring efficient investment in the digital radio infrastructure.

The access undertaking will promote competition in downstream markets:

- by facilitating the supply of digital radio broadcast services in downstream markets by content service providers that acquire the Multiplex Transmission Service as an input;
- by providing access to the Multiplex Transmission Service on an equal basis to all access seekers with respect to price and non-price terms; and

- ensuring that the costs that make up the Multiplex Transmission Service are efficient and provide only a reasonable commercial rate of return to each JVC.

The effect of the access undertaking is that it will potentially expand the level of choice available to listeners and advertisers. The rollout of DAB+ services in the Metropolitan Markets suggests that take up levels are likely to be strong over time and that there will be a range of other public benefits that flow from the rollout of DAB+ services.

This is likely to include:

- higher quality radio services relative to analogue services, particularly AM services;
- greater choice for listeners through the ability of broadcasters to use the capacity and capabilities of DAB+ technology to multi-channel and offer more channels and more diverse niche offerings;
- greater choice for advertisers, who will be able to advertise on digital radio channels as part of their advertising portfolios; and
- the potential for more innovative business models, such as ‘white label’ deals and the ability for access seeker to split their allocations into multiple streams to support multi-channelling.

The operational and technical requirements necessary for the safe and reliable operation of the service

The access undertaking has several measures to ensure that the Multiplex Transmission Service is operated in a safe and reliable way. This includes rights on the Multiplex Licensee to take measures against an access seeker where the access seeker is the source of any safety or reliability issues.

The economically efficient operation of the network

The pricing principles ensure that each Multiplex Licensee is only permitted to recover its efficient costs and a reasonable commercial rate of return.

These requirements are augmented by the strong incentives of each JVC shareholder to operate the JVC in a cost-efficient way that minimises gold-plating and avoids the pass through of inefficient costs to access seekers.

As the JVC shareholders will be the primary users of the Multiplex Transmission Service and the access charges will be a wholesale input cost into their downstream radio broadcasting businesses, the JVCs will have very strong incentives to avoid passing through inefficient costs that would otherwise make their own downstream businesses less efficient.

Similarly, JVCs are unlikely to have any real incentive to pass these costs through to non-affiliated access seekers (i.e. digital community broadcasters). The level of access charges will be equal as between incumbent commercial broadcasters and digital community broadcasters, and due to the organisational separation between each JVC and its shareholders, there is unlikely to be any prospect of anti-competitive cross-subsidisation or value transfers.

4.5 Whether the terms and conditions of access specified in the access undertaking include access prices or pricing methodologies which are fair and reasonable

The pricing principles set out in Schedule 2 of the access agreement are fair and reasonable.

The ACCC considers that fair and reasonable pricing should:²⁴

“reflect the efficient costs of providing access to the multiplex capacity and associated services including a normal commercial rate of return. Reasonable access prices are required to ensure that the pricing of access to multiplex capacity is not excessive. Fair access prices ensure that access seekers are not disadvantaged for reasons which are anti-competitive.”

The ACCC has indicated that fair and reasonable pricing methodologies may be acceptable in place of actual access costs which may not always be available at the time the access undertaking is lodged. Such methodologies should preferably include indicative prices, based on reasonable assumptions.²⁵

The pricing principles set out a methodology which seeks to allow the Multiplex Licensee to recover no more than its efficient costs and earn a normal rate of return on its investment.²⁶

“Efficient costs” are broken down into three categories:

- capital expenditure;
- operating expenditure; and
- corporate overheads.

These costs are converted to an annual fixed recurring charge, payable by each access seeker under clause 10.1 of the access agreement, in accordance with the following formula:

$$AFRC = AC \times \frac{BMC}{TMC}$$

In this formula:

- **AFRC** is the annual fixed recurring charge;
- **AC** is the Annualised Costs;
- **BMC** is the amount of Multiplex Capacity which is allocated to the access seeker by the Multiplex Licensee; and

²⁴ ACCC, Explanatory Statement – issued by the ACCC relating to the *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2018*, page 7.

²⁵ Ibid.

²⁶ Access agreement, clause 3.1 of Schedule 2.

- **TMC** is the total amount of Multiplex Capacity allocated to all access seekers by the Multiplex Licensee (which will not exceed 9/9 of capacity).

The pricing principles also provide for the JVC to obtain a reasonable commercial return on its investment, rather than supra-normal profits. In particular, the pricing principles provide for the WACC to be:

- commensurate with those of similar enterprises conducting similar businesses, with a similar risk profile and at a similar phase in their business cycle; and
- reviewed annually, with the Multiplex Licensee being obligated to select an ACCC-endorsed WACC derived by reference to the WACC approved by the ACCC at the time of the review for use in another regulated sector (such as telecommunications, electricity or gas).

The proposed straight-line depreciation method, which the JVC would lock-in over the life of the access undertaking, also ensures that access charges are fair and reasonable.

When taken together, the pricing principles operate to ensure that the Multiplex Licensee's prices are cost reflective, and consequently, fair and reasonable.

Such charges will also be implemented in a fair and transparent way, notably:

- access charges will be applied equally across all access seekers, and to the extent specific charges are payable to accommodate the specific requirements of a particular access seeker (e.g. line cards for splitting streams or channels), those charges will be recoverable from that access seeker only; and
- a transparent consultation process that provides an opportunity for all access seekers to offer feedback on proposed charges and an independent pathway for the resolution of any disputes.

4.6 Whether the access undertaking includes an obligation on the licensee to not hinder access to services

The access agreement, which forms part of the access undertaking, includes an express obligation on the Multiplex Licensee not to hinder access to the Multiplex Transmission Service.²⁷

4.7 Whether the terms and conditions of access specified in the access undertaking provide for a reasonable dispute resolution mechanism

The Explanatory Statement indicates that the ACCC's assessment of the Dispute Resolution Mechanism (**DRM**) is guided by whether the DRM facilitates "*fair, timely and efficient resolution of disputes*".²⁸

²⁷ Access agreement, clause 7.2 of the main body.

²⁸ ACCC, Explanatory Statement – issued by the ACCC relating to the *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2018*, page 8.

Examples of matters which the ACCC may consider when assessing the DRM include whether it:

- sets out the appropriate triggers and timeframes for dispute resolution, including the process for dispute notification and dispute termination;
- describes the process that will govern any dispute, including the definition and ambit of matters that may be resolved pursuant to the DRM and details of any differences between price and non-price processes;
- identifies an appropriate arbitrator, or outlines a process for the selection of an appropriate arbitrator, taking into account the arbitrator's independence and impartiality, appropriate credentials and industry-specific knowledge and skills;
- identifies (without limiting) the factors to which the arbitrator should have regard in considering a dispute, which should include the terms and conditions of the access undertaking;
- defines the duties, functions, liability, authority and jurisdiction of the arbitrator; and
- defines the enforceability of any dispute resolution mechanism on the parties, including the enforceability of an arbitrated settlement.

The JVCs submit that each of these elements is present in the proposed access undertaking.

In particular:

- **appropriate triggers and timeframes for dispute resolution:** The triggers and timeframes for dispute resolution are clearly set out in clause 2 of Schedule 3 of the access agreement. Clause 2 sets out when a dispute arises and the processes and timeframes for the initial escalation of disputes within each party's organisation, followed by escalation to the external dispute resolution bodies, which includes mediation and expert determination in accordance with the ADC's *Guidelines for Commercial Mediation and Rules for Expert Determination*.
- **processes that will govern any dispute:** Schedule 3 of the access agreement provides a procedure that will govern dispute resolution between the parties, including step-by-step processes for the parties to initiate disputes and escalate unresolved disputes. These procedures apply to all disputes affecting both price and non-price terms arising under the access agreement, with standard exceptions for billing disputes and situations where a party seeks "*urgent interlocutory, injunctive or other immediate relief from a court*".²⁹
- **identification of, or providing for a process to select, an appropriate arbitrator:** The proposed mediation process includes a specific selection criterion to ensure that the mediator appointed is independent, impartial and has appropriate

²⁹ Access agreement, clause 1.1(a) of Schedule 3.

credentials. Should a dispute not be resolved at mediation, then either party may refer a dispute for binding expert determination. An expert determination process has been adopted to ensure that the adjudicator is appropriately qualified and capable of readily understanding the issues that would typically arise in the broadcasting industry. The process for appointment of an expert adjudicator is also included in the access agreement and provides for the binding expert determination to be conducted in accordance with the *ADC's Rules for Expert Determination*.

- **identification of (without limiting) the factors to which the arbitrator should have regard in considering a dispute, which should include the terms and conditions of the access undertaking:** The access agreement satisfies this requirement by providing that an expert must have regard to the following factors when making an expert determination:
 - the terms of the access undertaking and access agreement;
 - the applicable terms of the Radiocommunications Act;
 - the legitimate business interests of the Multiplex Licensee and its investment in facilities used to supply the Multiplex Transmission Service;
 - the interests of access seekers;
 - the public interest in having competition in markets and efficient investment in facilities used to supply the Multiplex Transmission Service and services that use the Multiplex Transmission Service as an input;
 - the operational and technical requirements necessary for the safe and reliable operation of the Multiplex Transmission Service; and
 - the economically efficient operation of the facilities used to supply the Multiplex Transmission Service.

While the expert is required to consider these factors, nothing limits the expert to these factors when making an expert determination.

- **defining of the duties, functions, liability, authority and jurisdiction of the arbitrator:** The dispute resolution procedures provide that any binding expert determination must be conducted in accordance with the *ADC's Rules for Expert Determination*. These rules, together with the provisions of Schedule 3 of the access agreement, define the expert's duties, functions and liability – in particular, they provide:
 - that the duty and function of the expert is to conduct the expert determination in accordance with the procedures set out in the *Rules for Expert Determination*, and to make a binding determination;

- except in the case of fraud, the parties release the expert from any liability arising out of or in connection with the expert's appointment or the determination itself.³⁰
- Clause 4.3(c) of Schedule 3 of the access agreement also provides a list of factors which the expert must consider when making the expert determination – which ensures that the expert turns his/her mind to relevant issues when making the determination.
- that the expert's authority and jurisdiction are established by clause 4.4(b) of Schedule 3 of the access agreement, which provides that "*the decision of an expert is final and binding on the Parties*".
- **defining of the enforceability of any dispute resolution mechanism on the parties including the enforceability of an arbitrated settlement:** Clause 1.1 of Schedule 3 to the access agreement obliges the parties to resolve all disputes arising under or in connection with the agreement in accordance with the DRM. Furthermore, the DRM in the access agreement states that:
 - any settlement reached through mediation is final and binding on the parties; and
 - any expert determination is final and binding on the parties.

³⁰ Australian Disputes Centre, *Rules for Expert Determination 2015*, clause 8(a).

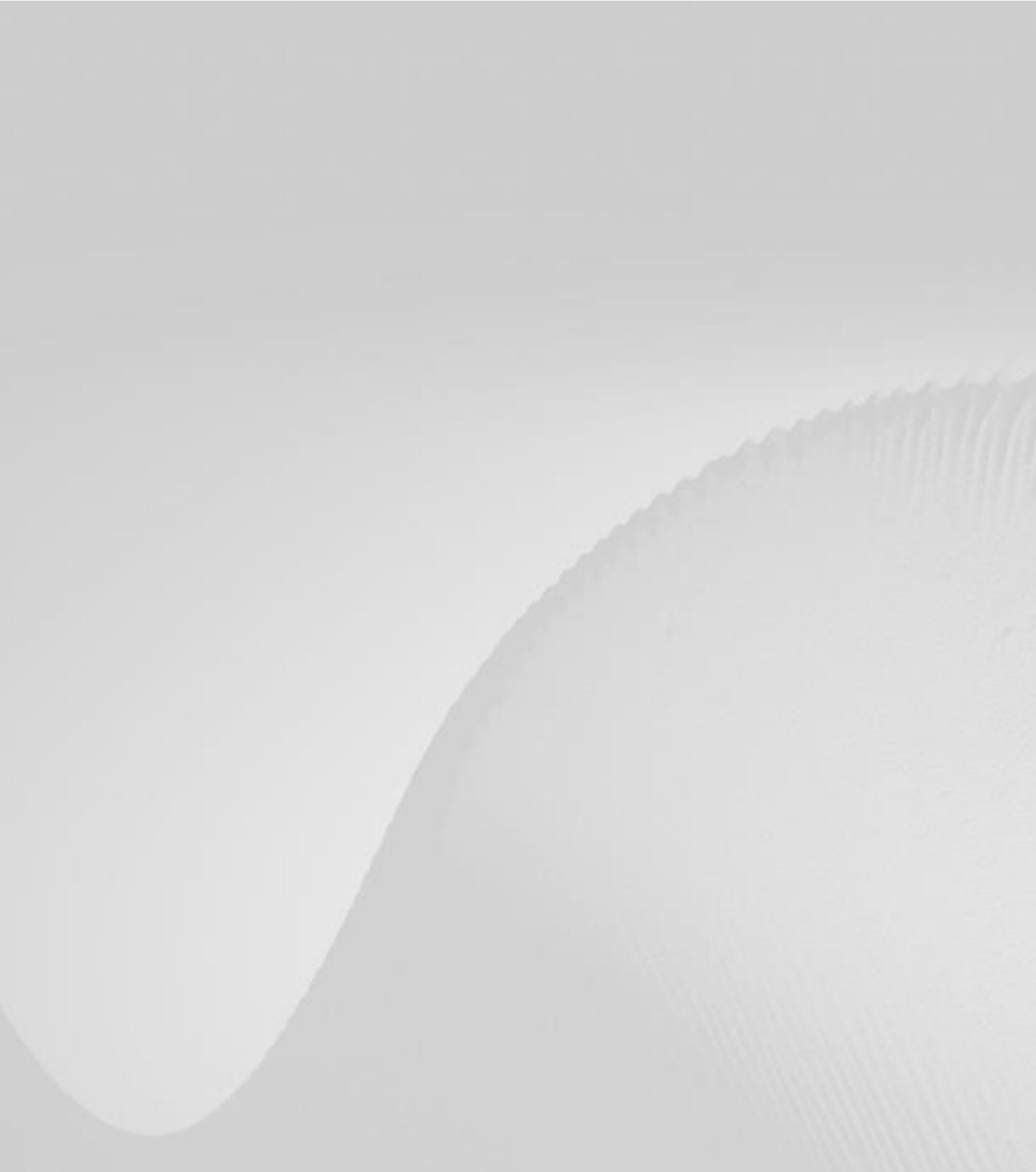
Attachment A Information required pursuant to Digital Radio Multiplex Transmitter Procedural Rules 2018

The following information is provided pursuant to section 9(1) of the *Digital Radio Multiplex Transmitter Procedural Rules 2018*:

Requested Information	Details
Name of licensee	Digital Radio Broadcasting Canberra Pty Ltd (ACN 627 555 695) – Foundation Category 1 Digital Radio Multiplex Transmitter Licence Number 10503410/1
Names of each member of the licensee	Canberra FM Radio Pty Ltd Radio Canberra Pty Ltd
Nominated contact for licensee	Tony Hudson Head of Legal and Corporate Affairs, Southern Cross Austereo PO Box 345 South Melbourne VIC 3205 <i>With a copy to:</i> Webb Henderson Level 18, 420 George Street, Sydney NSW 2000 Attention: Ara Margossian, Partner ara.margossian@webbhenderson.com
Details of the services to which access is to be provided	Please refer to access undertaking.
Details of the services to which the variation relates	Not applicable.
Reasons for variation	Not applicable.

Requested Information	Details
Name of licensee	Digital Radio Broadcasting Darwin Pty Ltd (ACN 625 618 840) – Foundation Category 1 Digital Radio Multiplex Transmitter Licence Number 10503674/1
Names of each member of the licensee	Northern Territory Broadcasters Pty Ltd
Nominated contact for licensee	Grant Cameron Grant Broadcasters Pty Ltd Level 3, Suite 303 10-12 Clarke St Crows Nest NSW 2065 <i>With a copy to:</i> Webb Henderson Level 18, 420 George Street, Sydney NSW 2000 Attention: Ara Margossian, Partner ara.margossian@webbhenderson.com
Details of the services to which access is to be provided	Please refer to access undertaking.
Details of the services to which the variation relates	Not applicable.
Reasons for variation	Not applicable.

Requested Information	Details
Name of licensee	Digital Radio Broadcasting Hobart Pty Ltd (ACN 128 742 709) – Foundation Category 1 Digital Radio Multiplex Transmitter Licence Number 10501814/1
Names of each member of the licensee	Great Southern Land Broadcasters Pty Ltd Commercial Broadcasters Pty Ltd
Nominated contact for licensee	Nicholas McKechnie Chief Financial Officer, Southern Cross Austereo PO Box 345 South Melbourne VIC 3205 <i>With a copy to:</i> Webb Henderson Level 18, 420 George Street, Sydney NSW 2000 Attention: Ara Margossian, Partner ara.margossian@webbhenderson.com
Details of the services to which access is to be provided	Please refer to access undertaking.
Details of the services to which the variation relates	Not applicable.
Reasons for variation	Not applicable.



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